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No. 09-1138

Supreme Court, U.S.
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# In The Supreme Court of the United States

TAM TRAVEL, INC., *et al.*,

*Petitioners,*

v.

DELTA AIR LINES, INC., *et al.*,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## REPLY BRIEF FOR PETITIONERS

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## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## INTRODUCTION

The first issue in this case is whether the pleading standard announced in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009) requires a price-fixing conspiracy complaint to exclude plausible explanations of defendants' misconduct in order to survive a motion to dismiss. The Second Circuit in *Starr v. Sony BMG Entm't*, 592 F.3d 314, 325 (2nd Cir. 2010) rejected this rule, noting that it would result in the improper application of the summary judgment standard on a motion to dismiss. The Sixth Circuit in this case, on the other hand, adopted it, found that respondents had offered "especially plausible" explanations for their alleged misconduct, affirmed dismissal of the complaint, and created a direct conflict with decisions of the Second Circuit and of this Court. Respondent Airlines do not contest that the adoption of such a rule would create a direct conflict. Instead, they claim the court of appeals did not adopt the rule in question. But, the lower courts have already interpreted the majority's opinion as having created a "significantly-heightened pleading standard" which, as Judge Merritt put it, requires the complaint to "exclud[e] any possibility that the defendants acted independently."

The second issue in this case concerns whether each purchase of a price-fixed product constitutes an

overt act that triggers a new cause of action in the context of a continuing conspiracy to fix prices. This Court has been joined by the Fourth and Eleventh Circuits in answering this question affirmatively. But, parting with these decisions, the court of appeals in this case held that United Airlines' continued purchase of price-fixed travel services did not constitute overt acts. Unable to defeat the petition's showing of this conflict, the Airlines dodge the question by misstating the lower court's decision. They do not offer a single argument to defeat the petition's showing of a circuit conflict.

The decision of the court of appeals in this case threatens the unbiased and non-arbitrary service of justice. The need for clear, workable pleading standards cannot be denied. Certiorari is needed to resolve the conflicts in the circuits and bring needed conformity to the application of the antitrust laws.[1]

## REASONS FOR GRANTING THE PETITION

### I. The Conflict In Decisions Over Whether A Complaint Must Exclude Defendants' Plausible Explanations Is Squarely Presented

The court of appeals' decision in this case creates a conflict because it applies *Twombly*'s plausibility

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[1] Although Travel Agents believe that the petition and the opposition in and of themselves demonstrate the need for this Court's review, the Court may wish to invite the Solicitor General to express the views of the United States.

standard backwards. Rather than analyze the plausibility of the claim alleged in the complaint, it analyzes the plausibility of defendants' explanations for the conduct. These explanations are found nowhere in the pleadings; they are merely arguments "contend[ed]" and "assert[ed]" (App. 25a) by the Airlines' lawyers in the legal memoranda supporting the motion to dismiss. But, treating these arguments as though they were factual explications on summary judgment, the lower court found them "especially plausible" (App. 25a) and, applying a balancing test, it determined that Airlines' explanations better accounted for "defendants' conduct" then did the allegations in the complaint. The complaint failed therefore – not because the allegations *themselves* were deficient – but because it failed to rebut Airlines' "plausible" explanations of the misconduct.

Respondents do not dispute that the creation of such a rule would create a circuit conflict; they openly concede that the Second Circuit in *Starr* rejected precisely such a rule. Opp. 4. Instead, their argument against the existence of a conflict rests entirely on the contention that the decision "does not announce a rule that a complaint must allege facts that tend to exclude the possibility of independent action in order to survive a motion to dismiss for failure to state a claim...." Opp. 6.

Respondents misread the decision. They seek to cut the language of the holding out from the body of the opinion and analyze it separately and apart. But, by stating "we *therefore* hold," the holding itself rejects

respondents' reading and necessarily incorporates the language that comes before it. There, in the paragraph immediately preceding the holding, the Sixth Circuit analyzed the "plausibility" of explanations offered by Airlines' lawyers through "conten[tions]" and "assert[ions]" found in the legal memoranda supporting the motion to dismiss.[2] Making various quasi-factual findings and referring to them as "facts" (App. 26a), the majority ultimately determined that Airlines' explanations were "especially plausible," *id.*, and that "defendants have offered a reasonable, alternative explanation for their parallel pricing behavior." App. 26a. It was on that basis that the Sixth Circuit *held* that "the complaint failed to allege sufficient fact ... because defendants' conduct ... was more likely explained by" their *post hoc* explanations. App. 26a. Thus, the complaint failed to state a claim because it did not include allegations that excluded defendants' explanations. In so doing, the Sixth Circuit created a direct conflict with *Starr*, 592 F.3d at 325.

Respondents are alone in reading the decision as not requiring complaints to exclude the defendants' explanations. In dissent, Judge Merritt read the majority decision as having "seriously misapplied the new standard by requiring the plaintiff to present at the pleading stage a strong probability of ... excluding

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[2] Notably, earlier in the decision, the court had adopted the legal standard for summary judgment on the basis that it "illuminates the plausibility of defendants' lawful [explanations]." App. 23a, n.7.

any possibility that the defendants acted independently and not in unison." App. 34a. This interpretation has a wide-reach. In *Anderson News, LLC v. Am. Media, Inc.*, No. 09-2227, Slip op. at 12-14 (S.D.N.Y. Aug. 2, 2010), *available at* 2010 U.S.Dist.LEXIS 77718, *26-*31, an out-of-circuit district court interpreted the court of appeals' decision as requiring a complaint to exclude defendants' plausible explanations. Adopting the rule, it held:

> The reasoning in *Travel Agent* applies here. Just as the *Travel Agent* Court found it plausible that the airlines independently instituted commission cuts and adopted a wait-and-see approach, so too it is plausible that each of the publisher Defendants unilaterally stopped shipping magazines to Anderson rather than pay the Surcharge.

*Id.* at 13. Similarly, in *Dobyns v. United States*, 91 Fed.Cl. 412, 424 and n.29 (Ct. Fed. Cl. 2010), the court interpreted the Sixth Circuit's decision as having "worked a sea change" that established a fundamentally different "significantly-heightened pleading standard."

Airlines nevertheless contend that the Sixth Circuit "did just what this Court did in *Twombly*." Opp. 6. They are incorrect. In *Twombly*, the only allegation was that the defendants acted in parallel, 550 U.S. at 556-57; the complaint did not allege any facts explaining the "*need* for joint encouragement to resist the 1996 Act...." *Id.* at 566 (emphasis added). When the *Twombly* Court observed an "obvious

alternative explanation" for the Baby Bells' parallel conduct, 550 U.S. at 567, it was not *weighing* that explanation against contrary allegations in the complaint, since there were none; it was merely explaining through example the "ambiguity of" unadorned "parallel conduct." *Id.* at 554. The complaint here, on the other hand, alleges specific facts to support allegations that joint action *was* necessary for the commission cuts to stick (App. 110a (¶85)), *why* it was necessary for the airlines to act jointly, and *why* no rational airline would act independently. App. 109a-112a (¶¶81-89). The court of appeals simply chose to weigh admittedly well-pleaded allegations against competing argumentative explanations. This is nothing like what this Court did in *Twombly*.

Airlines offer no explanation as to why the court of appeals' discussion of the applicable law was restricted to an analysis of the summary judgment standard in *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984) and *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995 (6th Cir. 1999). App. 22a-24a. They meekly support the Sixth Circuit's citation to *Monsanto* by saying the majority "correctly" identified "the modern standard to evaluate evidence bearing on concerted action." Opp. 5. There was nothing correct about identifying the *Monsanto* standard; evidence is not to be evaluated at the complaint stage. Moreover, the court of appeals not only failed to disclaim *Monsanto*'s inapplicability, it italicized the essential part of the rule. App. 22a. In fact, while respondents point out that the court of appeals claimed it was

constrained by Rule 12(b)(6) (App. 23a, n.7), it nevertheless specifically justified use of the summary judgment standard on the grounds it "illuminates the plausibility of defendants' lawful [explanations]." App. 23a, n.7.

The uncertainty surrounding application of the *Twombly* and *Iqbal* standards persists. Edward D. Cavanagh, *The Private Antitrust Remedy: Lessons from the American Experience*, 41 LOY.U.CHI.L.J. 629, 645 (Spring 2010) (citing *Tam Travel*, 583 F.3d at 908-09). "The problem is that [those cases] contain few guidelines to help the lower courts discern the difference between a 'plausible' and an implausible claim...." *Riley v. Vilsack*, 665 F.Supp.2d 994, 1003 (W.D.Wis. 2009); *Dobyns*, 91 Fed.Cl. 412 at 424-25 (categorizing the "disparate judicial thinking on this subject ... arrayed over a spectrum"). This case is an ideal vehicle for the Court to further develop the standard. *Twombly* and *Iqbal* provided factual scenarios that framed the issue in terms of what failed to state a claim. What is needed now is an example of what succeeds in stating a plausible claim. Like *Twombly*, this is a price-fixing case that relies on circumstantial evidence to prove conspiracy; as such, it will provide a much-needed "apples to apples" comparison of successful and unsuccessful plausible allegations.

Airlines contend that this case is aberrant because "petitioners had the unusual benefit" of discovery. Opp. 8. In fact, the opposite is true, since the discovery gives the complaint extraordinarily robust

allegations, including "specific, time-and-place factual allegations" (App. 37a), that "clearly satisf[y] the *Twombly* standard," and make this "an overwhelming case for a plaintiff to get by a motion to dismiss" (App. 36a) let alone a motion under 12(b)(6). Airlines also suggest that the district court's consideration of a deposition transcript makes this case less than ideal, "because Rule 12(d) would normally require application of the Rule 56 summary judgment standard in similar circumstances." Opp. 9. The argument merely draws a greater comparison between this case and *Twombly*; the district courts in both cases properly considered extra-pleading material that had been incorporated into the complaint. App. 111a (¶87); *Twombly*, 550 U.S. at 569, n.13.

## II. The Conflict In Decisions Over Whether The Purchase Of A Price-Fixed Service Is An "Overt Act" Is Squarely Presented

The issue presented in the petition is whether United committed "overt acts" in furtherance of the conspiracy each time it purchased price-fixed travel services. Pet. i. But unwilling or unable to address this issue, Airlines pose a different question, "[w]hether under 11 U.S.C. §1141(d)(1) confirmation of a defendant's bankruptcy plan discharges an antitrust claim that is predicated on pre-confirmation conduct." Opp. i. The answer to their question is, clearly, yes. An antitrust claim, indeed any claim, predicated entirely on pre-confirmation conduct is discharged. But that is not the issue presented here.

Travel Agents do not seek damages for injuries sustained from "pre-confirmation conduct." Rather, they seek damages for injuries sustained from acts United took *after* it emerged from bankruptcy.

Respondents hinge their opposition on a misrepresentation of the holding in this case. Without citation to the decision, they claim the "unremarkable holding" here is that "confirmation of a bankruptcy plan discharges claims that are dependent on pre-confirmation acts." Opp. 10. In fact, the court of appeals held nothing close to that. The Sixth Circuit, framing the issue solely in terms of whether United committed a "continuing antitrust conspiracy" under the doctrine established by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), limited its holding to determining whether United committed "overt acts" that resulted in the accrual of new causes of action. Thus, without a single reference to 11 U.S.C. §1141, the Sixth Circuit held:

> Here, we reject plaintiffs' attempt to characterize United's decision to maintain its 0% commission policy as an overt act. "Since the Supreme Court decided *Zenith*, federal courts have uniformly defined a continuing antitrust violation as one in which the plaintiff's interests are repeatedly invaded." Although United's participation in the alleged conspiracy would certainly create a rippling effect, plaintiffs assert that United's final act to effectuate that conspiracy occurred in

> 2002, long before United emerged from bankruptcy.

App. 11a (citation omitted). Bankruptcy law plays no part in this holding. It relies exclusively on the application of *Zenith*'s continuing conspiracy doctrine and an "overt act" as defined in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997). Therefore, respondents' initial argument that none of the decisions identified in the petition "involved the effects of a defendant's bankruptcy" (Opp. 10-11) proves nothing.

Respondents spend two pages explaining the difference between claim accrual in the bankruptcy and statutes of limitations setting to argue "the mere fact that an antitrust claim may, by virtue of an 'overt act,' accrue at one time for statute-of-limitations purposes does not mean that the claim necessarily accrues at the same time for bankruptcy purposes." Opp. 11. But, when the majority "reject[ed] plaintiffs' attempt to characterize United's decision to maintain its 0% commission policy as an overt act" (App. 11a), it did so within the context of the continuing conspiracy doctrine in *Zenith* – a statute of limitations case. Thus, respondents' premature merits argument attacks the Sixth Circuit's reasoning, not the existence of a circuit split. So, while respondents may argue that the Sixth Circuit should have applied different rules,[3]

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[3] Respondents are wrong on the merits, too. They greatly exaggerate as "well-established" the proposition that "statutes of limitations cases do not concern the same issues or the same principles" as cases involving claim accrual in bankruptcy. Opp.

(Continued on following page)

that argument does nothing to defeat the petition's showing of a conflict in how the Sixth Circuit applied the rules it did. If anything, respondents' argument offers another reason to review the decision.

The only time respondents mention the continuing conspiracy doctrine is their argument that two continuing trespass cases in the Eighth and Second Circuits have "reached a similar conclusion to that of the Sixth Circuit in this case." Opp. 13. But, this too is an irrelevant merits argument. Respondents badly misrepresent that *Int'l Paper Co. v. MCI WorldCom Network Servs., Inc.*, 442 F.3d 633, 635-36 (8th Cir. 2006) (per curiam) "held" "that a bankruptcy confirmation discharged ... post-discharge claims for a

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11. The quoted passage refers only to specific Tennessee state cases. *In re Edge*, 60 B.R. 690, 699 (Bankr.M.D.Tenn. 1986). In truth, respondents' cases only say that statutory limitation periods "do not necessarily" address the same issues as bankruptcy claim accrual. *In re Envirodyne Indus.*, 214 B.R. 338, 350 (N.D.Ill. 1997). In fact, respondents cases show that the accrual of a cause of action for purposes of *either* bankruptcy *or* statutes of limitation is triggered by the commission of an "act" that injures the plaintiff. Thus, "[t]he majority of ... courts" have held that "the claim ... arises for bankruptcy purposes at the time of *the act giving rise to the claim.... In re Wis. Barge Lines, Inc.*, 91 B.R. 65, 67-68 (Bankr.E.D.Mo. 1988) (emphasis added); *O'Loghlin v. County of Orange*, 229 F.3d 871, 874 (9th Cir. 2000) (adopting rule); *McSherry v. Trans World Airlines, Inc.*, 81 F.3d 739, 741 (8th Cir. 1996) (same). Likewise, in a continuing antitrust conspiracy, a new cause of action accrues "each time a plaintiff is injured by an act of the defendants...." *Zenith*, 401 U.S. at 338. Here, applying either statutes of limitations law or bankruptcy law, the purchases United made after it emerged from bankruptcy created *post-discharge* causes of action.

'continuing trespass' based on defendant's continued use of the cable." Opp. 13. Actually, the court did not hold that the post-discharge claims were discharged; it held there were *no* post-discharge claims at all, because "intangible" light is not capable of trespass. *Id.* at 636. Similarly, the continuing trespass theory failed in *In re WorldCom, Inc.*, 546 F.3d 211, 221 (2nd Cir. 2008), because "all the necessary elements were complete" pre-discharge and "plaintiff fail[ed] to allege any relevant post-confirmation conduct." *Id.* at 220, 221 n.7. These cases offer no guidance in determining the existence of a circuit conflict. They merely hold that a viable continuing violation must include post-confirmation acts, and the very question presented here is whether United's purchases constitute such acts.

Airlines complete their opposition with yet another irrelevant argument on the merits, claiming that *DXS, Inc. v. Siemens Med. Sys., Inc.*, 100 F.3d 462 (6th Cir. 1996) "squarely rejected" the "very theory" Travel Agents espouse here. Opp. 15. They fail to provide a pin cite for this supposed "rejection," because there is none – *DXS* says nothing about whether price-fixed purchases are overt acts because it did not involve a price-fixing conspiracy. Airlines recite in bold print *DXS*'s statement that an overt act "must be a new and independent act that is not merely a reaffirmation of a previous act." Opp. 15 (emphasis omitted). But, this argument begs the question. The issue to be decided on the petition is not whether the purchase of a price-fixed product is

the reaffirmation of a previous act – the issue is whether the Sixth Circuit's conclusion to that effect conflicts with the contrary holdings of this Court, and the Fourth and Eleventh Circuits. On that point – in fact on any point concerning the circuit conflict identified in the petition – respondents' opposition says nothing at all.[4]

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[4] Respondents are wrong on the merits, too. The only antitrust cases that have applied the "reaffirmation" language have been "refusal to deal" cases, like those cited by respondents. Opp. 15. Not a single price-fixing case has applied this language to the purchase of a price-fixed service.